No. 89-1080

Supreme Court, U.S.
F I L E D
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF AMICI CURIAE OF THE COUNCIL OF THE GREAT CITY SCHOOLS, THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

DAVID S. TATEL *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
JOHN W. BORKOWSKI
PATRICIA M. WRIGHT
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5787

Counsel for The Council of the Great City Schools, the American Association of School Administrators and the National Association of Secondary School Principals

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Standard For Dissolving An Injunction Against A School District Declared Unitary Cannot Be Fairly Resolved Without Addressing The Standard By Which A District May Appropriately Be Declared Unitary	6
A. The Meaning of Unitariness Is Logically Encompassed in the Question on which This Court Has Granted Review	6
B. If the Court Declines to Address the Unitary Standard in this Case, Detrimental, Conflicting Results in the Lower Courts Will Inevitably Continue	8
II. Desegregation Injunctions Should Be Dissolved And Full Operating Control Returned To A Defendant School District Only When It Has Substantially Complied With All Outstanding Court Orders, Eliminated The Vestiges Of Segregation To The Maximum Extent Practical And Demonstrated A Good-Faith Commitment To Protecting The Constitutional Rights Of All Students	11
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:	Page
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)	7
Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986), *aff'd*, 829 F.2d 1308 (4th Cir. 1987)	9
Brown v. Board of Education, 347 U.S. 483 (1954)	*passim*
Brown v. Board of Education, 349 U.S. 294 (1955)	12, 13
Columbus Board of Education v. Penick, 443 U.S. 449 (1979)	13
Cuyler v. Sullivan, 446 U.S. 335 (1980)	7
Davis v. Board of School Commissioners, 402 U.S. 33 (1971)	14
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977)	13
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	7
Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985)	8
Green v. County School Board, 391 U.S. 430 (1968)	*passim*
Keyes v. School District No. 1, 413 U.S. 189 (1973)	13
Milliken v. Bradley, 418 U.S. 717 (1974)	13
Milliken v. Bradley, 433 U.S. 267 (1977)	14, 16
Monteilh v. St. Landry Parish School Board, 848 F.2d 625 (5th Cir. 1988)	9
Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987)	9, 14
Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976)	12
Pitts v. Freeman, 755 F.2d 1423 (11th Cir. 1985)	9
Raney v. Board of Education, 391 U.S. 443 (1968)	13
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	*passim*
Swift v. Tyson, 41 U.S. 1 (1842)	7
United States v. Mendenhall, 446 U.S. 544 (1980)	7
United States v. Swift & Co., 286 U.S. 106 (1932)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968)	14
Vance v. Terrazas, 444 U.S. 252 (1980)	7
Vaughns v. Board of Education, 758 F.2d 983 (4th Cir. 1985)	9
Youngblood v. Board of Public Instruction of Bay County, 448 F.2d 770 (5th Cir. 1971)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1080

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,
Petitioner,

v.

ROBERT L. DOWELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF AMICI CURIAE OF THE COUNCIL OF THE GREAT CITY SCHOOLS, THE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

INTEREST OF AMICI CURIAE

The Council of the Great City Schools ("the Council") is a coalition of 45 of the largest urban public school districts in the United States.[1] Council members educate

---

[1] The members of the Council are: Anchorage, Atlanta, Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Columbus, Dade County, Dallas, Dayton, Denver, Detroit, East Baton Rouge, El Paso, Fresno, Houston, Indianapolis, Jacksonville, Long Beach, Los Angeles, Memphis, Milwaukee, Minneapolis, Nashville, New

12 percent of the nation's schoolchildren and one-third of the nation's minority children. The Board of Directors, the Executive Committee and other committees of the Council are comprised of superintendents and school board representatives from member districts. The Council was organized in 1961 to help large urban school districts develop and implement programs designed to ensure quality education and equality of educational opportunities for urban students. The Council represents major school districts before the federal legislative and executive branch officials who determine national educational law and policy.

The American Association of School Administrators ("AASA") is the national professional organization for school district administrators and other educators in our nation's public schools. AASA's members include approximately 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies. Thus AASA's members are responsible for the daily operation of our nation's diverse public school systems, many of which have implemented desegregation plans.

The National Association of Secondary School Principals ("NASSP") is a voluntary association of approximately 42,000 administrators of public and private secondary schools throughout the United States. It was organized in 1916 to provide a voice for secondary school principals and assistant principals in the formulation of all aspects of educational policy in the United States. Many NASSP members are thus deeply involved in the day-to-day implementation of desegregation remedies throughout the nation.

Orleans, New York City, Norfolk, Oakland, Omaha, Philadelphia, Phoenix, Pittsburgh, Portland, Rochester, St. Louis, St. Paul, San Diego, San Francisco, Seattle, Toledo, Tucson, Tulsa and Washington, D.C.

The Council, AASA and NASSP file a brief in this case for three reasons. First, these *amici* have considerable experience bearing upon the issues presented by the case. For example, 13 of the Council's 45 member districts are currently under active federal court supervision and eight of these districts have been under federal court order for more than ten years. Seven member districts have been declared unitary, but the status of 17 districts is unclear because although they have been under federal or state desegregation orders in the past, the active supervision of these orders has ceased, without a declaration of unitariness. Another eight Council member districts, while not under court order, have undertaken desegregation efforts to comply with what they see as their obligation to provide equal educational opportunity and their desire to be in all respects a unitary school system.

Second, the Court's resolution of the central issue in this case—the nature and duration of federal-court supervision of desegregation programs—will have a dramatic impact on these *amici* and their members. It was 36 years ago, in *Brown v. Board of Education*, 347 U.S. 483 (1954), that a unanimous Supreme Court committed this nation to eliminating the scourge of official segregation in our public schools. We have made an enormous amount of progress toward that goal, but the job is not yet done. The school districts and the administrators who are members of *amici* are fully committed to completing the task and to ensuring that the constitutional rights of minority children are fully protected.[2] As the same time, they are also fully committed to acting in their respective capacities in such a manner as to restore local autonomy to their school districts and end the need for further federal court involvement. Their

---

[2] The minority student populations in Council member districts range from 21.7 percent to 96.5 percent, and AASA and NASSP members similarly serve in dozens of diverse school districts.

efforts to achieve these two goals have been hampered because the lower federal courts have developed a variety of uncertain, sometimes conflicting standards to determine when a school system is desegrated and when judicial oversight should terminate. As we enter the last decade of the Twentieth Century, *amici* believe it is important for this Court to clarify these issues so that the nation's effort to eliminate the vestiges of its history of segregation can be completed and its schools returned to appropriately elected and appointed school officials who have demonstrated the commitment necessary to ensure the rights of minority children.

Finally, these *amici* have a view of these issues that they believe is different from that of either party. Specifically, the Council, AASA and NASSP contend that the central question presented—whether the dissolution of desegregation decrees must meet the standard enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932)—turns on two important considerations. First, where violations of the rights of minority students have been found, those violations must be fully remedied and the interests of those students judicially protected during that remedial process. Second, there must come a time in each school desegregation case when court supervision ends and the operation of local schools is returned fully to local school district officials. As explained in this brief, *amici* believe that the best way to achieve both of these important goals—complete vindication of minority children's constitutional rights and restoration of local autonomy—is for this Court to (1) determine in this case the standards that must be met to prove that a unitary school district has been established; and (2) hold that once such a district has been established, outstanding federal-court injunctive decrees must be dissolved.

SUMMARY OF ARGUMENT

The question whether all federal-court injunctive decrees must be dissolved upon the finding of unitariness cannot be fully and fairly considered apart from the *standard* by which unitariness was found. The purpose of injunctive decrees in all desegregation cases should be to ensure that the harm of segregation has been *fully* remedied. In our view, the standard for unitariness should in substance mirror that purpose. Where such a standard is applied and met, it follows that any outstanding injunctive decrees should be dissolved. But until the *content* of that standard has been established, the Court cannot know whether the standard ensures that the purpose of the injunctive decrees has been met and the decree therefore may be appropriately dissolved. For that reason, and because the lower courts have in practice been applying *conflicting* unitariness standards, this Court should address and determine the correct standard in this case.

A declaration of unitariness should be issued only after the district court has made findings on three issues: (1) whether the defendants have substantially complied with all outstanding desegregation orders; (2) whether the desegregation plans and orders have been effective in remedying the violations found by the court, *i.e.*, whether they have eliminated segregation and its vestiges to the maximum extent practical; and (3) whether the defendants have demonstrated sufficient good faith in the desegregation effort that the court expects the school district to afford full protection to the constitutional rights of minority school children. The parties should be offered the opportunity for a full evidentiary hearing on each of these issues and, where a defendant school district meets these three requirements, unitariness should be declared and judicial supervision should end.

ARGUMENT

I. The Standard For Dissolving An Injunction Against A School District Declared Unitary Cannot Be Fairly Resolved Without Addressing The Standard By Which A District May Appropriately Be Declared Unitary.

A. The Meaning of Unitariness Is Logically Encompassed in the Question on which this Court Has Granted Review.

The Petitioner itself recognized in seeking review by this Court that "[t]he question of when a desegregation decree should be lifted is an important unsettled question, intertwined with the meaning of unitariness itself. . . ."[4] This intertwining results from the fact, long made clear by this Court, that "unitariness" is the goal of all judicial supervision of school district defendants that have been found liable for unconstitutional segregation. Thus, as the Court recognized in *Green v. County School Board*, 391 U.S. 430, 436 (1968), "[t]he transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about" in the desegregation cases. *Accord, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 31 (1971).

Mandatory injunctions have been the near-universal means by which the federal courts have attempted to bring about unitary status. If the purpose of a desegregation injunction is to bring about unitary status, consideration of whether an injunction survives a declarration of unitariness, under the *Swift*[4] standard or any other approach, is incomplete without a common under-

[3] Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit of the Board of Education of Oklahoma City Public Schools, at 24 (filed Jan. 3, 1990) (hereinafter "Petition").

[4] *United States v. Swift*, 286 U.S. 106 (1932).

standing of what unitary status means.[5] An injunction is only the means to the goal of desegregation. To *amici*, it is not logical to separate the issue of when an injunction should be lifted from the issue of whether that injunction has achieved its goal and cured the condition that was found to violate the Constitution. Put another way, it puts the cart before the horse to consider how long an injunction endures without weighing whether it has done the job of creating a desegregated school system.

In our view, it makes no sense to talk of a school district being "unitary" unless the constitutional violation has been cured, just as in *Swift*, the Court expressed reluctance to release defendants from an injunction until their unlawful monopoly was cured. There would be no need, however, to apply the precise verbal formulation of the *Swift* rule in school desegregation cases if a tough but workable requirement for unitariness determinations were uniformly applied, because the purpose of the *Swift* rule—to ensure that a remedy has fully cured the violation found by the court—would be fully satisfied. The *Swift* issue and the unitariness issue are therefore fundamentally the same: has the condition necessitating judicial intervention been fully cured? If it has, judicial supervision should end; but unless the *content* of the

[5] This Court has held that questions not directly presented in a petition for certiorari but "fairly comprised" in it should be decided where their resolution is essential to the correct disposition of other issues in the case. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 552 n.5 (1980). Accordingly, where a given issue is "predicate to an intelligent resolution" of a question on which certiorari was granted, this Court has felt compelled to address it. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). *See also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 66, 68-69 (1938) (Court reached issue of whether *Swift v. Tyson*, 41 U.S. 1 (1842) was still good law although parties agreed on that issue).

unitariness standard ensures that the constitutional violation has in fact been fully remedied, there can be no assurance that the judicial task is complete. For this reason alone, the Court should address the appropriate content of the unitariness standard in this case.

B. If the Court Declines to Address the Unitary Standard in This Case, Detrimental, Conflicting Results in the Lower Courts Will Inevitably Continue.

If the standards and procedures for unitariness were clear and uniform, the Court could restrict itself to the narrow issue whether a desegregation decree survives a declaration of unitariness. Unfortunately, the lower federal courts have articulated a variety of standards of unitariness. Indeed, members of the Council, AASA and NASSP now function under widely different substantive standards for achieving unitariness depending on the federal judicial circuit in which they are located. Furthermore, member districts may or may not have an opportunity for an evidentiary hearing, depending on the court that considers the issue.

The courts below have used the word "unitary" in a variety of inconsistent ways. For example, the Eleventh Circuit, relying on Fifth Circuit precedent, draws a distinction between a "unitary school district" and a district that has achieved "unitary status." In *Georgia State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985), the court explained that a district that meets the requirements of *Green* and *Swann* and has not operated segregated schools "for a period of several years" is unitary, but that a school district cannot be said to have achieved "unitary status" unless it "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures." 775 F.2d at 1413 n.12. The court held that a district that is "unitary" but has not achieved "unitary status" retains its affirmative obligation to eliminate the vestiges of prior unconstitutional conduct and

that a challenge to school district action may be successful without proof of segregative intent. *Id.* at 1414.

It is also unclear what standard of actual desegregation must be reached for a district to be considered unitary. Some courts have relied heavily on mathematical evidence of racial balance where further desegregation may be possible, *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983 (4th Cir. 1985), while others have recognized circumstances in which it is appropriate to allow one-race schools to remain. *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987). Some courts have even suggested that the mere passage of time can lead to unitary status. *See, e.g., Bradley v. Baliles*, 639 F. Supp. 680, 691 (E.D. Va. 1986) (court noting, "the longer the time since a school system has been segregated, the less likely it would be that the vestiges of such segregation remain in the system"), *aff'd*, 829 F.2d 1308 (4th Cir. 1987).

Furthermore, most of the circuits have not addressed the question of the specific procedures to be conducted by a district court in deciding whether a school district is unitary. The Fifth Circuit, however, has fairly detailed procedural requirements, including an opportunity for a hearing, for evaluating the achievement of unitary status. *See Youngblood v. Board of Public Instruction of Bay County*, 448 F.2d 770 (5th Cir. 1971).[6] The Eleventh Circuit generally has followed the approach of the Fifth Circuit. Thus, in *Pitts v. Freeman*, 755 F.2d 1423 (11th Cir. 1985), the court reversed a district court's finding of unitariness because it failed to hold a hearing prior to its determination. *Id.* at 1426 ("[i]n

[6] *See Monteilh v. St. Landry Parish School Board*, 848 F.2d 625, 629 (5th Cir. 1988) ("because our procedures had not been followed before the court in 1971 declared St. Landry to be unitary, we find neither the district court nor the panel affirming its order intended to declare that the district was unitary, in the sense of having eliminated all vestiges of past discrimination").

order to conclude a school desegregation case, a district court must hold a hearing to determine if the school system indeed has achieved unitary status").

Of greatest importance here, courts have made statements about "unitary status" on the assumption that their orders nonetheless would continue in force. It is not clear that those statements would have been made if the law were clear that desegregation decrees do not survive a finding of unitariness. For example, Petitioner relies on a 1977 reference by the District Court calling the Oklahoma City Public Schools "unitary." Petition at 3. But the order also makes clear that the court assumed the termination of its jurisdiction would not result in any "dismantlement of the Plan . . . ."[7]

This disarray among the lower federal courts has a dramatic adverse impact on school districts operating under court-ordered desegregation plans, including Council member districts and those in which AASA and NASSP members work. A major problem for such school districts is extended litigation over whether they are unitary and what continuing obligations, if any, unitariness entails. Some school districts have sought to establish that they are unitary, only to find upon reaching court that they have prepared to litigate under one standard, while the court imposed another. Other districts remain for extended periods under court jurisdiction without raising the unitariness issue for fear that they will incur new court-ordered obligations through the process. Still others have not had any active involvement by the district court for years, but feel completely unclear about their ability to take steps that would be inconsistent with old court orders.

This Court would only exacerbate the confusion and create unintended results by ruling on the *effects* of uni-

[7] Brief in Opposition to Petition for Certiorari of Robert L. Dowell, *et al.*, at 2a (filed March 5, 1990).

tary status without providing guidance as to how a proper determination of unitariness may be made in the first instance. To conclude, for example, that no further court supervision or injunctive relief may continue in a school district that has been labeled "unitary," without ensuring that a tough, workable standard for unitariness has been applied, could leave minority schoolchildren without ever having a full remedy for the constitutional wrong they have suffered. On the other hand, to hold that the strong language of *Swift* governs even after the vestiges of segregation have been eliminated might result in failures to return schools to local control in a timely manner. In addition, for this Court to hold that all judicial supervision of a school district must end upon the finding of unitariness—irrespective of the standard for that finding—will inevitably produce conflicting judicial supervision owing to varying standards of unitariness. The tough but workable requirements for achieving unitariness that we propose would minimize these unwanted results. We urge the Court to adopt them in this case.

II. Desegregation Injunctions Should Be Dissolved And Full Operating Control Returned To A Defendant School District Only When It Has Substantially Complied With All Outstanding Court Orders, Eliminated The Vestiges Of Segregation To The Maximum Extent Practical And Demonstrated A Good-Faith Commitment To Protecting The Constitutional Rights Of All Students.

The Council, AASA and NASSP urge the Court to make clear that unitariness requires an opportunity for a full evidentiary hearing to determine whether: (1) the defendants have substantially complied with all outstanding court orders; (2) the identified vestiges of segregation have been eliminated to the maximum extent practical; and (3) the defendants have demonstrated suffi-

cient good faith to indicate that further court oversight is not needed to assure vindication of constitutional rights. After a school district has satisfied this standard, court jurisdiction should end, injunctive orders should cease, and full operating autonomy should be restored to the school system.

We recommend this standard because we believe that there must come a point when each school desegregation case ends. We believe that this is the fair implication of the *Brown II* decision, in which district courts were authorized to retain jurisdiction only during a "[period of] transition to . . . a racially nondiscriminatory school system." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). This also was the meaning of the Court's extended discussion in *Swann* of the limits on federal equitable power:

> At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green* and *Alexander*.
>
> It does not follow that the communities served by such systems will remain demographically stable, for in a growing mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that the federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

402 U.S. at 31-32. *Accord, Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 435-37 (1976).

Full control ultimately should be returned to local school authorities because, as the Court also has recognized, "local autonomy of school districts is a vital national tradition." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977). *Accord, Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) ("[n]o single tradition in public education is more deeply rooted than local control over the operation of schools"). *Amici* recognize, however, that school districts found to have violated the Constitution must meet meaningful standards to earn the trust that they can once again operate the schools consistent with the Constitution and free from continuing court orders.

The first prong of the three-part test that we recommend is whether the defendant school district has substantially complied with all outstanding court orders. This standard is intended to ensure that the remedial plans developed by the parties and the court have been implemented. It also provides school districts with clear guidance on what their first priority should be in seeking to attain unitary status.

But compliance alone should not become the basis for a determination of unitary status. This Court has held repeatedly that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed in judging school desegregation remedies.[8] This constitutes the second prong. The Court held early on in *Raney v. Board of Education*, 391 U.S. 443 (1968), that a release of jurisdiction upon a showing merely that a school district adopted a remedial plan would "ordinarily be inconsistent with the responsibility imposed on the district courts by *Brown II*." 391 U.S. at 449 (citation omitted). It still is true today that effectiveness in implementation must be considered as well, because a plan initially approved and faithfully followed may turn out to need ad-

[8] *See Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

justment or enhancement before it is successful in removing the lingering vestiges of segregation. It is not realistic to expect the parties in desegregation cases or the district courts to arrive in the first instance at a totally sufficient plan.

As this Court directed in *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971), school districts under court order are bound to achieve "the greatest possible degree of *actual desegregation*, taking into account the practicalities of the situation." 402 U.S. at 37 (emphasis added). Similarly, *Swift* and its progeny teach that a decree may be modified if necessary to achieve its original purpose. *See United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968). Accordingly, vestiges that have been found causally related to unconstitutional segregation should be required to be removed. These vestiges can include segregative student or faculty assignments, disproportionate racial representation in extracurricular activities, or other discriminatory placement and teaching practices; segregated housing patterns; unequal facilities; or inadequate educational programs. *See Milliken v. Bradley*, 433 U.S. 267 (1977); *Swann*, 402 U.S. at 18; *Green*, 391 U.S. 430.

The parties also should have the opportunity to address the good faith of the defendants. Therefore, the third prong is the district court's test of the defendants' good faith; a district court should find a school district unitary only if it is confident that the school district defendant is aware of its constitutional obligations and will continue to fulfill them.[9] Where a court has reason to believe that racial animus taints local decision-making, it may be appropriate to retain jurisdiction temporarily after the other two standards have been met. This third prong is an unexceptional application of traditional equitable principles.

---

[9] *See Morgan v. Nucci*, 831 F.2d 313, 321 (1st Cir. 1987).

The standards that we propose lend clarity and give direction, but are intentionally quite general. This recognizes the different circumstances existing in school districts throughout the country and permits the district courts to fashion their orders to reflect the unique conditions of each school district.

Finally, the parties should have the opportunity to probe all three of these issues at a full and fair evidentiary hearing. If a hearing is requested, the school district should have an opportunity to present its evidence, and the plaintiffs and other parties should have an opportunity to present evidence in support or opposition.

A holding by the Court now that there will be an opportunity for a hearing serves several positive purposes. First, it avoids the risk to all parties in these cases that a trial court will make pronouncements about unitary status issues without hearing from all concerned parties and weighing all of the relevant evidence. Second, it encourages full and faithful constitutional compliance by school districts because they will be on notice that their conduct may be aired in a public forum. Finally, it protects the due process interests of the plaintiffs, who are entitled to a hearing if they so request before their rights in the injunction are terminated.

CONCLUSION

Thirty-six years after *Brown* we remain firmly committed to its principles and believe this Court should not back away from them. There may be no single issue that has been as dominant a concern for AASA, NASSP and the Council in recent years as how to provide equal educational opportunity for minority students. *Amici* recognize that this challenge requires that we not limit our concerns for students to those matters comfortably falling within the confines of our classrooms. We know as educators that where our schools are built on the legacy of segregation, remedial measures must be directed specificaliy at the imbalanced racial compositions of schools,

faculty and staff, the reduced expectations that adults often bring to their contacts with minority children, and the resource deprivations that were the product of schools —or even school districts—being viewed as fit only for minority children. This Court has so taught for decades in its cases from *Brown v. Board of Education*, 347 U.S. 483 (1954), through *Milliken v. Bradley*, 433 U.S. 267 (1977). The approach outlined in this brief will best help us to fulfill the promise of *Brown* and to regain full control of our schools when the vestiges of segregation have been eliminated.

For the foregoing reasons, this Court should hold that mandatory injunctive relief in school desegregation cases ends where it has been established, after an opportunity for an evidentiary hearing, that the school district defendant has substantially complied with all outstanding court orders, eliminated the vestiges of segregation to the maximum extent practical, and exhibited a good-faith commitment to protecting the constitutional rights of its students.

Respectfully submitted,

DAVID S. TATEL *
WALTER A. SMITH, JR.
PATRICIA A. BRANNAN
JOHN W. BORKOWSKI
PATRICIA M. WRIGHT
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5787
Counsel for
The Council of the Great City Schools, the American Association of School Administrators and the National Association of Secondary School Principals

* Counsel of Record